

APR 8 1976

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 75-1316

NED E. WILLIAMS, Director of Environmental Protection,
State of Ohio,
Appellee,

VS.

CITY OF CANTON, OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

MOTION TO DISMISS

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ON APPEAL FROM THE SUPREME COURT
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MOTION TO DISMISS

The Appellee moves the Court pursuant to Supreme Court Rule 16(1)(b), to dismiss the appeal herein on the grounds that the federal questions sought to be reviewed were not properly raised in the state court proceedings and that this appeal does not present a substantial federal question.

ARGUMENT

I. The Federal Questions Sought to Be Reviewed Were Not Properly Raised in the State Court Proceedings.

The Appellant contends that jurisdiction lies in this Court on authority of 28 United States Code, Section 1257(2). That section provides that:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

An essential prerequisite of jurisdiction pursuant to this section is that a substantial federal question be properly raised in the state court proceedings. As stated in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond questions that the party bringing a case here from such court intended to assert a federal right."

The Appellant has attempted, at pages 6 through 9 of its Jurisdictional Statement, to establish that the federal questions were properly raised below. However, the fact remains, as will be hereinafter demonstrated, that the Appellant failed to raise, in any fashion whatsoever, any fed-

eral question in either the Ohio Court of Appeals or the Ohio Supreme Court and further, that neither the Court of Appeals nor the Ohio Supreme Court relied upon, or even considered any federal question. The decisions of the Court of Appeals and of the Ohio Supreme Court were based solely upon consideration of Ohio general law and of the Ohio Constitution.

Appellant first claims that a federal question was raised in the state proceedings by its Notice of Appeal to the Ohio Court of Appeals, which challenged the decision of the Ohio Environmental Board of Review as being, "unlawful, unreasonable, void and contrary to the laws and constitution of the State of Ohio and of the United States." This Court has held many times that a mere reference to the "Constitution and laws of the United States" is insufficient to properly raise a federal question. *Herndon v. Georgia*, 295 U.S. 441, 442-3 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 248 (1902); *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897).

Appellant next claims that a federal question was raised in the Ohio Court of Appeals. No claim could be more inaccurate. An examination of Appellant's brief in the Court of Appeals discloses that Appellant assigned two errors, both of which were questions of Ohio constitutional law (App., p. A7). Furthermore, Appellant's Table of Authorities in that brief cites not a single federal statute or federal constitutional provision (App., p. A7).

Appellant next asserts, at page 7 of the Jurisdictional Statement, that the Ohio Court of Appeals "based its decision upon other broad federal constitutional principles. . . ." Appellant goes on to allege that the court states the pivotal question "in the language of federal due process

analysis," citing a passage from the decision of the Court of Appeals which does not mention due process, the Fifth Amendment, the Fourteenth Amendment or any other federal statute or constitutional provision.

Not surprisingly, the Appellant fails to call the Court's attention to that portion of the Ohio Court of Appeals decision which appears at page A22 of the Jurisdictional Statement. There the Court of Appeals sets out in numbered paragraphs the legal issues presented by this case. Then, the court makes the following statement:

The sole assignment of error is that the order appealed from is contrary to law by reason of Ohio Constitutional infirmity. *No federal claim has been made.* (Emphasis added.)

Therefore, Appellant's contention that the Ohio Court of Appeals based its decision on federal grounds is specifically contradicted by that court's opinion.

Appellant next contends that a federal question was properly raised in the Ohio Supreme Court and, in fact, that the federal issues were the essential issues upon which the court's decision was based (Jurisdictional Statement, p. 9). Again, Appellant cites passages from the court's decision which makes no mention of any particular federal statute or constitutional provision. In fact, it is clear from the context that the court was referring to Ohio law rather than to federal law.

An examination of the Brief of Appellee filed in the Ohio Supreme Court once again discloses that the Appellant failed to raise any federal question before that court. The Propositions of Law make no mention of federal law and the Table of Authorities includes no citation to any federal statute or federal constitutional provision (App., pp. A8-A13).

Furthermore, the decision of the Ohio Supreme Court in this case was based exclusively on Ohio law. (See the Syllabi of the Opinion of the Ohio Supreme Court, p. A2 of the Jurisdictional Statement.)

II. This Appeal Does Not Present a Substantial Federal Question.

Appellant's primary argument, as set forth in the Jurisdictional Statement, is that Section 6111.13 of the Ohio Revised Code violates the due process clause of the United States Constitution. However, the courts of this country, both state and federal, have held with virtual unanimity that the fluoridation of public water systems does not violate the due process clause, or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution. See *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N.E.2d 609, appeal dismissed for want of a substantial federal question, 351 U.S. 935 (1956); *Alkire v. Cashman*, 477 F.2d 598 (6th Cir. 1973), cert. den., 414 U.S. 858 (1973); *Crawford v. City of Detroit*, 389 F.2d 1001 (6th Cir. 1968); *Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142, appeal dismissed for want of a substantial federal question, 348 U.S. 892 (1954); *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961); *Dowell v. City of Tulsa*, 273 P.2d 859 (Okl. 1954), cert. denied, 348 U.S. 912 (1955); also see, *Opinion of Justices*, 243 A.2d 716 (Del. 1968); *Schuringa v. Chicago*, 30 Ill. 2d 504, 198 N.E.2d 326 (1966); *Miller v. Evansville*, 247 Ind. 563, 219 N.E.2d 900 (1966); *Baer v. Bend*, 206 Or. 221, 292 P.2d 134 (1956); *Birnel v. Fircrest*, 53 Wash. 2d 830, 335 P.2d 819 (1959).

Appellant further contends that Section 6111.13 of the Ohio Revised Code violates the equal protection clause of the United States Constitution. That precise question

was presented and decided adversely to Appellant in *Alkire v. Cashman*, 350 F. Supp. 360 (D.C. Ohio, 1972), *aff'd.*, 477 F.2d 598 (6th Cir. 1973), *cert. den.*, 414 U.S. 858 (1973).

The authorities cited amply demonstrate that this appeal does not present a substantial federal question.

CONCLUSION

Wherefore, Appellee respectfully submits that the Appellant has failed to properly raise any federal question in the proceedings below. Furthermore, the decisions of both the Ohio Court of Appeals and the Ohio Supreme Court were based exclusively upon considerations of Ohio law. Appellee further submits, on the basis of the foregoing authority, that this appeal does not present a substantial federal question.

Therefore, pursuant to 28 U.S.C. Section 1257(2) and United States Supreme Court Rule 16(1)(b), the Appellee respectfully moves this Honorable Court to dismiss this appeal.

Respectfully submitted,

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APPENDIX

EXCERPT FROM BRIEF OF APPELLANT IN THE COURT OF APPEALS

(Case No. CA 4116, City of Canton, Plaintiff-Appellant
vs. Ira L. Whitman, etc., Defendant-Appellee)

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**EXCERPT FROM BRIEF OF APPELLEE IN THE
OHIO SUPREME COURT**

(Case No. 75-282, Ned E. Williams, etc., Appellant
vs. City of Canton, Appellee)

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